No. 84-725

In the Supreme Court of the United States

October Term, 1984

McDONOUGH POWER EQUIPMENT, INC.,
a Fuqua Industry Corporation,
Petitioner,

vs.

PATRICIA J. WOOD,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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I.

STATEMENT OF THE CASE

Petitioner has persisted in its unrelenting efforts to misstate the facts, omit significant facts, and draw impliedly uncontroverted conclusions from the facts. Despite Petitioner's continued reference to "conflicting evidence" the transcript clearly showed the claimed contrary testimony to be in fact consistent with Respondent's explanation of how her accident occurred. Respondent's cause was submitted to the jury against Petitioner upon the strict liability theories of design defect which produced a lift-off of the front wheels and therefore loss of steering ability,

design defect due to lack of a quick stop mechanism to protect against blade contact in the event that the mower tipped or rolled over and finally a failure to warn of these defects. No witness testified, as Petitioner claims, that Respondent simply drove over the wall through inadvertence. One witness was either unsure of how exactly the incident occurred or supported Respondent's testimony that the lift-off phenomenon had occurred. The other was only certain that the mower had gone over the wall at an angle in the area Respondent described as the location of the accident.

Petitioner complains shrilly that in spite of evidence of Respondent's contributory negligence the trial court "refused all *suggestions* by the defendant for *jury instructions* and it" to submit its claimed defense (Petition for Writ of Certiorari pages 3 to 4) (emphasis added). Neither the Tenth Circuit Court of Appeals nor this Court has ever been favored by Petitioner with any specific reference to a proffered but refused instruction or offered but excluded evidence concerning Respondent's conduct or actions in the operation and use of Petitioner's lawnmower.

The only evidence which was excluded by the trial court and of which Petitioner complained to the Tenth Circuit dealt with Petitioner's compliance with voluntary industry safety standards for lawnmowers. As the Tenth Circuit noted (App. 7) evidence as to the "feasibility of safety features in light of historical safety standards and practices" was introduced over this Respondent's repeated objections.

Petitioner's complaint must apparently be based upon some claimed prejudice by reason of Respondent's abandonment at the close of her case of the alternative theory of negligence in favor of a theory of strict liability. But

what error did that selection of alternative theories of liability produce? Surely Petitioner does not suggest that a defendant may introduce evidence or submit instructions concerning legal theories which are not part of the cause ultimately submitted to the jury. Rather the argument must be that somehow Petitioner is prejudiced because a plaintiff abandons a theory at the close of his case after introducing evidence to support that theory. Petitioner does not, however, point to any evidence of its negligence that was presented by Respondent in her case or demonstrate how it would be harmed thereby once the theory has been abandoned. Petitioner complains of a double standard being applied by the trial court and the Tenth Circuit (Petition for Writ of Certiorari page 4). However, its only real complaint is that the individual defendants and Respondent's *misconduct* were at issue while Petitioner was restricted from presenting affirmative evidence of the *absence* of negligence on its part.

II.

REASONS FOR NOT GRANTING THE PETITION

The use of Certiorari is wisely and necessarily limited to cases where a real and embarrassing conflict in opinion and authority exists between the Circuits, *NLRB v. Pittsburgh S.S. Company,* (1951) 340 U.S. 498, 95 L.Ed. 479, 71 S.Ct. 453, and for those occasions where the Supreme Court's power of supervision should be properly exercised.

Petitioner complains that the District Court and Tenth Circuit ignored the application of the Kansas Comparative Negligence Act, K.S.A. 60-258a, to strict liability actions as required by *Forsythe v. Coats Company, Inc.,* 230 Kan. 553, 639 P.2d 43 (1982). Petitioner's complaint, however, is

obviated by the verdict itself which reduced Respondent's claim by forty-nine percent (49%) based upon her conduct in the operation of the lawnmower. If the Comparative Negligence Act had not been applied by the District Court there would have been no basis for any reduction of Respondent's damages. Of course, in the usual strict liability case the conduct of the plaintiff (except in limited circumstances amounting to assumption of the risk) would in the absence of application of comparative negligence or fault principles have no relevance and in no way affect the verdict or amount. At no place, however, in the formal trial record itself, in any motion for new trial, or in its brief to the Tenth Circuit, or Petition for Writ of Certiorari to this Court has Petitioner pointed to any specific objection to an instruction given by the District Court. As the Tenth Circuit noted (App. 5) the District Court incorporated the language of the most recent pattern jury instructions utilized by Kansas state courts. Though Petitioner complains elsewhere that the Tenth Circuit ignored its own opinion in *Hardin v. Manitowoc-Forsythe Corporation*, 691 F.2d 449 (10th Cir. 1982), that opinion in fact instructed the Federal District Courts in Kansas to utilize instructions such as submitted by the trial court herein until further direction or refinement by decisional law.

In *Kennedy v. City of Sawyer*, 4 Kan.App.2d 545, 608 P.2d 1379, reversed 228 Kan. 439, 618 P.2d 788 (1980) and in *Albertson v. Volkswagenwerke Aktiengesellschaft*, 230 Kan. 368, 634 P.2d 1127 (1981), Kansas appellate courts discussed the meaning and application of comparative negligence principles to strict liability or non-negligence actions. After the *Kennedy* decision the Pattern Instructions of Kansas (PIK) were modified to incorporate comparative negligence principles into strict liability actions. The revised language of PIK 13.23 was substantially followed

by the District Court herein in its instruction number 17. Moreover, instruction number 19 required the jury to determine "whether Plaintiff (Respondent) was also at fault" and "the extent to which each of the parties may have played a role in causing plaintiff's injuries and resulting damages."

Petitioner urges as its initial basis for Certiorari that the District Court and the Tenth Circuit (1) ignored dispositive decisions of the Kansas Supreme Court and (2) the Tenth Circuit opinion conflicted with other Tenth Circuit opinions. The first contention is that the decision of the Kansas Supreme Court in *Forsythe, supra,* was ignored.

As Petitioner has done repeatedly in briefs and motions to the District Court, the Tenth Circuit and now to this Court it has blatantly, if unintentionally, misconstrued, distorted or frankly misstated the holdings and reasonings of various judicial opinions. The question certified in *Forysthe did not,* as claimed by Petitioner, ask whether the Kansas Comparative Negligence Act applies in strict liability cases. As the Kansas Supreme Court itself discussed in *Forsythe,* application of the principles incorporated in that Act to strict liability had been recognized by Kansas Courts in 1980 and in fact predicted by the Kansas Federal District Courts even before that time. The issue in *Forsythe* was much narrower: having applied comparative fault principles to strict liability actions should it be applied as pure comparative fault or modified comparative fault such as utilized by the Kansas Comparative Negligence Act. In the modified system a plaintiff is barred if his fault exceeds forty-nine percent (49%). The issue presented in *Forsythe* is obviously not present in this case. Respondent frankly cannot comprehend Petitioner's misunderstanding of the extremely precise question presented and answered in *Forsythe.*

Although Respondent hesitates to accuse any party of paranoia she can find no other palatable explanation for the language, implications and innuendos contained in the Petition for Certiorari. She finds shocking the suggestion that the District Court (which itself certified the question in *Forsythe*) was aware that *Forsythe* required particular rulings in this case but nevertheless decided to "give special dispensation to plaintiff" (Petition for Certiorari page 10) and "blatantly" violated the Rules of Decision Act, 28 U.S.C. Section 1652, by choosing to accept the Tenth Circuit Opinion "in perference to the explicit stated answer of the Kansas Supreme Court to a certified question" (Petition for Certiorari page 11). Petitioner next proceeds to contend that the Tenth Circuit compounded the error by ignoring its own decision in *Hardin, supra,* and persisted in ignoring the law, by relying upon its own "outdated" and "repudiated" decision in *Rexrode v. American Laundry Press Co.*, 674 F.2d 826 (10th Cir. 1982), cert. denied 459 U.S. 862, 74 L.Ed.2d 117, 103 S.Ct. 137 (1982) (Petition for Certiorari page 12). Petitioner's paranoia apparently extends to the Tenth Circuit as well since that Court "repeatedly" and "without explanatory response" has ignored these "incomprehensible conflicts" (Petition for Certiorari page 12).

Strong and vituperative language is, however, no substitute for legal analysis and argument. As indicated above Petitioner argues that the District Court relied on *Rexrode* rather than the applicable Kansas Supreme Court decision. Despite repeated readings of the *Rexrode* opinion Respondent can discern no issue, discussion or holding in that case concerning the application of comparative fault principles to strict liability actions. The only issue in *Rexrode* at all related to this cause, involved the admissibility of compliance with voluntary industry standards. It must there-

fore be Petitioner's theory that application of comparative fault to strict liability actions requires the admission of compliance with voluntary industry standards. Respondent cannot discern that the counsel representing both this Petitioner and the defendant in *Rexrode* made any argument there that comparative fault made such standards admissible or that the *Rexrode* Court so ruled. Moreover, though Petitioner claims that *Rexrode* has been repudiated by *Hardin* a thorough reading of the *Hardin* decision reveals (1) *Rexrode* is never mentioned in that decision and (2) that no issue regarding the admission of industry safety standards is present.

Respondent's difficulty with Petitioner's arguments regarding application of comparative fault (which difficulties were apparently shared by the Tenth Circuit) is that they are academic and semantical and are never related by Petitioner to the admission/exclusion of evidence or the giving/refusal of a jury instruction (App. 5-6). Although the thrust of Petitioner's argument must be directed toward *Respondent's duty of care,* it never points to any evidence offered or excluded regarding Respondent's conduct but only to its own rejected evidence of its own exercise of due care (by means of showing compliance with industry safety standards). Similarly, Petitioner never refers to any instruction it offered concerning what it claims to be the proper application of comparative fault in a Kansas strict liability action; nor does it refer to any specific objection to the instructions given by the District Court. The reason for that failure is obvious and even fatal to Petitioner's argument. Instructions given followed the Kansas Pattern Instructions and addressed all properly raised issues (App. 13-14).

For many of these same reasons Petitioner's contention that the Tenth Circuit opinion herein conflicts with

its own opinion in *Prince v. Leesona Corporation*, 720 F.2d 1166 (10th Cir. 1983) is in error. Once again no issue is presented in *Prince* concerning the admission of any testimony or jury instruction that was either contrary to the Court's opinion herein or applied comparative fault differently than the District Court and Tenth Circuit did herein. *Prince* involved a strict liability claim wherein the defendant manufacturer claimed the plaintiff was contributorily at fault. On appeal the plaintiff claimed instructional error and argued that assumption of the risk only and not negligence was to be compared to the defendant's fault. Properly rejecting that argument under Kansas Law the Tenth Circuit approved instructions (see footnote 11 at page 1172) that are substantially identical to the instructions given by the same District Court in this cause in referring to a plaintiff's unreasonable use of the product.

Respondent is somewhat at a loss as how to respond to the broadsword of Petitioner's attack upon the Tenth Circuit Court of Appeals in numerous cases other than the one present before this Court. Though she does not believe it to be her right let alone her duty to defend the opinions involved in those cases she cannot ignore assertions utilized to secure Certiorari herein that the Tenth Circuit has "shaped (the law) expressly to favor one class of litigants over another" and is unwilling "to afford equal justice to those who can 'afford to pay' " (Petition for Certiorari page 13). If an entire Circuit Court of Appeals is prejudiced against certain litigants, follows a standard of presumptive harmlessness where certain defendants complain and ignores "the most grievous errors committed against defendants" while allowing plaintiffs "new trials on demand" then most certainly the exercise of this Court's supervisory jurisdiction

is required. Respondent does not believe, however, that because Petitioner is dissatisfied with the results in this case (and apparently many others) that the Tenth Circuit is incapable of or even worse, unwilling to interpret and apply the law properly and fairly.

Even though carefully reasoned and specific response to issues concealed by emotional claims of prejudice and unequal treatment are difficult Respondent will undertake the endeavor. It would seem the Petitioner's complaints can be even further refined to contend that the Tenth Circuit has applied an erroneous and inconsistent standard with regard to the severity of alleged trial error (1) arising from the exclusion of certain evidence (compliance with voluntary industry standards) (2) the giving of instructions concerning the relative duties of parties in a strict liability case.

Petitioner strives to conceal and distort the issue regarding admissibility of compliance with voluntary industry safety standards. Petitioner repeatedly diverts attention from the evidentiary nature of the issue and casts it in terms of a state substantive law issue governed by the Rules of Decision Act. Regardless of how the issue is cast, Petitioner's argument must be rejected. It fails to anywhere demonstrate or explain how a state rule or statute requiring comparison of plaintiff's conduct with that of the manufacturer in a strict liability case compels the introduction of evidence to show the *manufacturer's* exercise of due care by compliance with minimum voluntary industry safety standards. To accept Petitioner's argument would be to lower the manufacturer's duty to whatever level the industry to which it belongs establishes for itself. It would totally abolish the doctrine of strict liability. Yet Petitioner points to no Kansas decision abolishing that doctrine or even questioning the higher duties it places upon the

manufacturer than a theory of negligence. Nor does Petitioner cite *any* Kansas opinion or other case permitting the introduction of compliance with voluntary industry safety standards in an action based upon strict liability. Rather Petitioner claims that it is somehow prejudiced because plaintiff elected to abandon negligence theories and proceed upon strict liability.

It is difficult to perceive how the exclusion of evidence bearing upon a theory upon which the jury was not instructed can harm Petitioner, particularly where the abandoned theory imposed a lower standard of care upon the manufacturer than does the strict liability theory. As the Tenth Circuit noted (App. 7) the trial court *permitted* the use of industry safety standards upon the subject of feasibility of remedial safety designs as approved in *Rexrode, supra.* Though Petitioner claims that *Rexrode* was repudiated by *Hardin, supra,* the latter case did not involve admissibility of evidence of compliance with industry safety standards. Nor does any other decision cited and relied upon by Petitioner involve that issue. Respondent can therefore find no basis for Petitioner's claim that the Tenth Circuit ignored either its own decisions or violated the Rules of Decision Act by ignoring Kansas decisions establishing the substantive law of the case.

Petitioner's reliance upon *Robinson v. Audi NSU Auto Union,* 739 F.2d 1481 (1984), is similarly unavailing. Clearly that case involved the exclusion of evidence necessary to satisfy and relevant to the plaintiff's burden of proof against one of the defendants. Extensive discussion of the substantiality or harmlessness of error seems unnecessary where the evidence is clearly admissible against one defendant and is excluded only because not admissible

against a co-defendant. The distinction between *Robinson* and this cause is even more striking when the evidence is considered in light of the burden of proof in that cause and the issues submitted to the jury. In this case the excluded evidence dealt with an issue not before the jury (Petitioner's negligence) and would only tend to prove Petitioner's exercise of due care which is not, of course, a defense or issue in a strict liability case.

Petitioner's last contention relating to claimed instructional error must also fail. As Petitioner admits the general rule requires not perfection but will compel reversal,

> "[O]nly if the trial judges' instructions to the jury, taken as a whole, give a misleading impression or inadequate understanding of the law or issues to be resolved . . ."

Bass v. International Brotherhood of Boiler Makers, 630 F.2d 1058 (5th Cir. 1980). Certainly Petitioner cannot claim that Respondent's comparative fault was not submitted to the jury since forty-nine percent (49%) of the responsibility was assigned to her by the jury. Its complaint must therefore be with the form and language of the submission. The Petitioner has never directed the attention of the District Court, the Tenth Circuit Court of Appeals or the Supreme Court to any different form of instruction it offered or to any specific objection at trial to any particular instruction. Federal Rule of Civil Procedure 51 reads in relevant part:

> "[N]o party may assign as error the giving or failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

Nor has Petitioner *ever* advanced to the trial court, the Tenth Circuit or this Court any instruction which would have corrected the alleged defects. Having failed to do so he cannot claim error. *Priggins v. Wilkinson,* 296 F.2d 74 (10th Cir. 1961); see also Federal Jury Practice and Instruction by Devitt and Blackmar, Section 703 at page 216.

The proper test on appellate review is whether the jury was misled in any way and whether it understood the issues. *Divorskin v. Rollins, Inc.,* 634 F.2d 285 (5th Cir. 1980). One of the instructions specifically attacked by Petitioner in the Tenth Circuit directs the jury to consider reasonable use of the product by Respondent, that is, whether the manner of her use of the product was appropriate, and to consider her conduct in determining the contributory fault of the Respondent. See *Hardin, supra,* for the approval of similar language in another strict liability case. Nor does Petitioner point to any Kansas Pattern Instruction or Kansas Appellate decision requiring the use of different language for the presentation of the plaintiff's comparative fault in a strict liability case. As the Tenth Circuit itself noted the language of the instructions utilized by the District Court followed the Kansas Pattern Instruction.

CONCLUSION

Petitioner's arguments for this Court's grant of Certiorari are all rhetoric and no substance. Petitioner fails, as it did in the Tenth Circuit, to ever explain or demonstrate any error material to the proceedings in the District Court, let alone one which was capable of affecting the merits of the cause or Petitioner's substantial procedural rights. Petitioner's complaints are really only with the result—the jury's conclusion. Rhetoric and allegations of prejudice by the District Court and the Tenth Circuit not supported by any substantial error in the cause are not a sufficient basis for a grant of Certiorari.

Respectfully submitted,

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